IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

WEDNESDAY, THE 12TH SEPTEMBER 2007 / 21ST BHADRA 1929

FAO.No. 182 of 2007()

AS.352/1997 of DISTRICT COURT, THRISSUR

.....

APPELLANT/APPELLANT/PETITIONER/IST DEFENDANT

JOHNY, AGED 57 YEARS,
S/O.MANJALI DEVASSY,
DINHA ROAD, NELLIKKUNNU DESOM,
PARAVATTANI, OLLUKKARA VILLAGE, THRISSUR TALUK,
THRISSUR DISTRICT.

BY ADV. SRI.C.A.CHACKO
SMT.C.M.CHARISMA
SRI.N.A.SHAFEEK

RESPONDENTS: RESPONDENTS RESPONDENTS/PLAINTIFFS

---

1. MAR ADAYI SLLEHA CHURCH,
REPRESENTEND BY ITS VICAR REV.FR.P.LAZAR KASISA,
PARAVTTANY SQUARE DESOM, OLLUKKARA VILLAGE.

2. FRANCIS,
S/O.CHERUVATHUR RAPPAI,
KUNNATHUMKARA DESOM,OLLUKKARA VILLAGE,
THRISSUR TALUK,THRISSUR DISTRICT.

3. ANTO @ ANTO D. OLLUKARAN,
S/O.PORATHUR OLLUKKARAN DEVASSY,
KUNNATHUMKARA DESOM,OLLUKKARA VILLAGE,
THRISSUR TALUK, THRISSUR DISTRICT.

BY ADV. SRI.K.JAYAKUMAR
SRI.P.B.KRISHNAN

THIS FIRST APPEAL FROM ORDERS HAVING COME UP FOR ADMISSION ON 12/09/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

K.PADMANABHAN NAIR, J.

F.A.O.No.182 of 2007

Dated this the 12th September, 2007.

J U D G M E N T

Heard. Admitted. Advocate Sri.S.Krishnan takes notice for the respondents.

2. Appellant is the petitioner in A.S.No.352/1997, on the file of the District Court, Thrissur. Respondents filed the suit for settlement of accounts and for realisation of money. The Trial Court passed the decree, as early as on 19.7.1997. The preliminary decree was passed directing the defendants to settle the accounts of the plaintiff for the period from 30.1.1994 to 4.2.1995. The decree also provides for appointment of an Advocate Commissioner and an expert auditor for settlement of the accounts. Challenging that decision, appellant filed A.S.No.352/1997. The second appellant in A.S.No.352/1997 died during January 2001. But his legal representatives were not impleaded. On 19.1.2002, the learned counsel appearing for the first appellant reported no instruction. First appellant was called and he was absent. Hence, he was set ex party and appeal was dismissed for default. Appellant filed a petition for

restoration of the appeal dismissed for default along with a petition to condone the delay of 1402 days in filing the petition for restoration. The court below dismissed the delay petition, as well as the petition for restoration. This F.A.O. is filed challenging the order passed by the court below dismissing the delay petition alone.

3. No Appeal is seen filed against the petition filed under Order XLI Rule 19 of the Civil Procedure Code for restoration of the appeal dismissed for default. The learned counsel appearing for the appellant submits that without the knowledge and consent of the appellant, the learned counsel appearing for the appellant reported no instruction. I do not find any force in that contention. Admittedly, the second appellant in the appeal died during January 2001. No steps were taken to implead the legal representatives of the deceased second appellant. The first appellant had no case that cause of action does not survive the other appellant, and as such, it is not necessary to implead the legal representatives of the deceased second appellant. So, the appeal had abatted also.

4. In this particular case, plaintiffs had filed a petition for passing of a final decree and that proceedings is pending. So, the appellants cannot plead ignorance. There is every possibility that

appellant may have met his counsel in the court below on various occasions. So, he should have taken steps to prosecute the appeal. The reasons stated by the lower appellate court that the petitioner has not explained the delay in filing the petition for restoration is perfectly correct. I do not find any reason to interfere with that finding, especially, in view of the fact that no appeal was filed against the order dismissing the petition to restore the appeal dismissed for default.

5. The learned counsel appearing for the appellant submits that necessary safeguards may be made in the order, and the appellants' right to challenge the judgment rendered by the court below on 19.7.1997 may not be affected. I make it clear that if the appellant has a remedy against that decree and judgment, this order will not be a bar.

In the result, the F.A.O. is dismissed.

K.PADMANABHAN NAIR,
JUDGE

nj.